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1 RECORD OF ORAL HEARING
2 U.S. PATENT AND TRADEMARK OFFICE

3 _____
4 BEFORE THE BOARD OF PATENT APPEALS
5 AND INTERFERENCES

6 _____
7 *Ex Parte* JEFFREY L. HIRKA and STEVEN J. FOX

8 _____
9 Appeal 2010-001593
10 Application 09/655,886
11 Technology Center 3600

12 _____
13 Oral Hearing Held: February 9, 2011

14 _____
15 Before HUBERT C. LORIN, JOSEPH A. FISCHETTI, and
16 BIBHU R. MOHANTY, *Administrative Patent Judges*.

17 APPEARANCES:

18 ON BEHALF OF THE APPELLANT:

19 STEPHEN SCHREINER, ESQUIRE
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23 The above-entitled matter came on for hearing on Wednesday,
24 February 9, 2011, commencing at 1:25 p.m., at the U.S. Patent and
25 Trademark Office, 600 Dulany Street, Alexandria, Virginia, before
26 Timothy J. Atkinson, Jr., a Notary Public.

1

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PROCEEDINGS

3

THE USHER: Calendar No. 43, Appeal No. 2010-1593,

4

Mr. Schreiner.

5

JUDGE LORIN: Great. Thank you very much. Good afternoon,
counsel. You're Stephen Schreiner?

7

MR. SCHREINER: Yes, sir.

8

JUDGE LORIN: Welcome. And would you introduce your
colleague, please?

10

MR. SCHREINER: Yes, I will. I'm Steve Schreiner from Goodwin
Procter appearing on behalf of JPMorgan Chase, the owner of the
application at issue, and this is Dr. Bill Mann from JPMorgan Chase, who is
attending to watch.

14

JUDGE LORIN: Great, great. Thank you very much. Welcome.
Please have a seat, please.

16

DR. MANN: Thank you, sir.

17

JUDGE LORIN: All right, counsel, this is Appeal 2010-001593.
We're familiar with the record. When you're ready you may proceed. You
have 20 minutes.

20

MR. SCHREINER: Thank you, Your Honor. Good afternoon to all
the members of the Board. As I said, I'm Steven Schreiner and I'm with
Goodwin Procter here in Washington, D.C. I'm here on behalf of the Appeal
for Patent Application 09/655,886, which is called a system and method for
linked accounts having sweep feature.

25

A couple preliminary items. There is a related appeal that was not on
appeal at the time this case was fully briefed. The related appeal is on a

26

1 continuation of this case, which is Serial No. 11/697,440. It's Appeal No.
2 2011-002133. It's been docketed for the Board, but no hearing date has been
3 set.

4 JUDGE MOHANTY: Could you -- what is that -- 2133?

5 MR. SCHREINER: Yes, 2011-002133.

6 JUDGE MOHANTY: And the serial number is 11/697,440?

7 MR. SCHREINER: Yes, sir.

8 JUDGE MOHANTY: Okay. Thank you.

9 MR. SCHREINER: The claims at issue in that case and the art that's
10 been cited are different, so we do not believe that the outcome of this appeal
11 will affect that appeal, nor vice versa. But again, I did want to bring it to the
12 Board's attention.

13 JUDGE LORIN: Did you file a request for a hearing in that case, the
14 other one?

15 MR. SCHREINER: We did.

16 JUDGE LORIN: You did?

17 MR. SCHREINER: We did.

18 JUDGE LORIN: Okay.

19 MR. SCHREINER: I'm fairly -- I'm almost certain that we did.

20 JUDGE LORIN: Okay.

21 MR. SCHREINER: Yeah. And we did -- in that appeal, which was
22 briefed later, we did reference this appeal.

23 JUDGE LORIN: Okay. Good, good. All right. Thank you for --

24 MR. SCHREINER: Certainly. Second preliminary note is that just to
25 point out to the Board, you know, the context of this -- the examination of
26 this application and on the briefing by both Appellant and the Examiner in

1 his Answer was of course pre-KSR. And so as we all know, you know, at
2 that time, the law of obviousness, TSM, all of that, was kind of in flux. The
3 Federal Circuit was tweaking things. And what I think the record reflects is
4 some considerable confusion about what the inquiry, the proper inquiry was
5 required for obviousness rejections. And I'll speak to some of those
6 specifics later.

7 The invention is directed to a linked account instrument or a linked
8 account card which is linked to underlying accounts used to satisfy any
9 purchase transactions made. So the linked account instrument, or I'll call it a
10 linked account card because it can be embodied in a card, that linked
11 account card is associated with an underlying cash account and it's also
12 associated with an underlying credit account.

13 Now, looking at the relationship between the cash account and the
14 credit account, the credit account is a back-up account to the cash account.
15 So what that means is when, let's say, any -- I'll speak in terms of days
16 although the period can obviously differ, you know, in terms of when
17 settlements occur, and the like. But a series of transactions take place during
18 a given day using this transaction card. At the end of the day, there's going
19 to be a settlement between the issuer of that transaction card, that linked
20 account card, a settlement between the issuer of that and the consumer and,
21 more specifically, with the consumer's cash account and/or credit account.

22 And the way the invention operates is that at the end of the day there's
23 going to be a sweep. It's kind of a quasi-settlement. It's not settlement in the
24 normal way we think of settlements between financial institutions. It's going
25 to be a sweep so that the amount of the purchases that were made for that
26 day will attempt to be satisfied or paid out of the cash account. If the cash

1 account has insufficient funds, then the amounts are going to be covered out
2 of the back-up credit account.

3 Now, when you go to, let's say, the next day and the card, this linked
4 account card, is used for a series of purchases, you're again going to at the
5 end of the day have a sweep, and this sweep is going to again attempt to pay
6 the amounts for the day's transactions out of the cash account. And it's also
7 going to attempt to cover or pay down any amounts that are in the credit
8 account as a result of, for example, past overdrafts. So there's an automatic
9 reconciliation feature or automatic back-up credit account pay-down feature
10 in this invention that is, you know, very important to its -- the benefits that it
11 brings. So that's an overview of the invention.

12 I could refer the Board members to figure 1 of the application
13 and walk you through what I just described if that would be helpful. If not, I
14 can proceed on to addressing what we view as the errors and the projection.

15 JUDGE LORIN: Okay. Yeah. I think you can proceed.

16 MR. SCHREINER: Okay. And one final sort of summary point
17 about describing the invention, you know, in effect, what it creates is a card,
18 a flexible payment card, that can kind of morph between a debit card and a
19 credit card. And furthermore, it ensures that whenever the credit card or the
20 credit element or credit account is tapped to cover something that is not
21 satisfied by the cash account, that overdraft amount is automatically paid
22 down.

23 An additional benefit of the invention is that these three accounts --
24 and I view it as kind of a triangle. At the top you've got the linked account
25 card, then you've got the cash account, and then you've got the back-up
26 credit account. Those three accounts can be associated with three different

1 financial institutions. So for example, the linked account card could be
2 issued by JPMorgan Chase, and the consumer -- let's say I'm the consumer, I
3 can select what cash account do I want to use to back this linked account
4 card and then what credit instrument do I want to use to back up that cash
5 account.

6 So you could have JPMorgan with the linked account card, I could use
7 my Citibank checking account for the cash account, and then I could use my
8 Bank of America credit card as the credit account. And for the consumer,
9 that gives a lot of flexibility. The consumer can select instruments based on,
10 you know, their benefits. Like, maybe the consumer would use cards that
11 have certain rewards and the like, and also just based on the consumer's
12 changing relationships with banks. You know, we all periodically change
13 credit card companies, so the consumer can go and change the back-up
14 credit account.

15 So turning to the rejections, the -- I'm going to focus on Claim 1, and
16 I'll focus on some of the main -- critical claim language in Claim 1. Claim 1
17 recites a system for processing electronic transactions. You've got a first
18 interface to a cash account against which charges are made through the use
19 of the linked account instrument. So that's the linked account instrument or
20 linked account card that I've been referring to. There's a second interface to
21 a credit account that's used to back the cash account in the event that
22 insufficient funds are available in the credit account. And then thirdly,
23 there's an authorization server that does this settlement or sweep that I
24 discussed before that will run these sweeps to satisfy the amounts due out of
25 the cash account. And that includes that day's purchases as well as any
26 lingering balance in the credit account. I think everything I just described

1 from the claim language is consistent with the overview of the invention I
2 gave to the Board members.

3 The three issues on Appeal that -- there's really two that I'm going to
4 focus on. The first is I think there's a fundamental legal error in the
5 obviousness standard that was applied in this case and that taints the
6 rejection from beginning to end unfortunately. And I think it's based on a
7 misreading of *In re: Kahn*. And it's -- as I mentioned at the outset, I think it's
8 a result of the fact that, you know, there was some flux in the law of
9 obviousness at the time. The second is, and more conventionally, the
10 references that have been applied, primary reference of *Atkins*, secondary
11 reference of *Schein*, fail to teach or suggest all the elements recited in the
12 claims. And the third would be, you know, an apparent reason to combine --
13 or exercise of ordinary skill and the like to render the claim combination
14 pursuant to KSR. I'm going to focus on the first two, the legal error and the
15 failure to show all the elements of the claimed invention.

16 Okay, starting on the question of the legal error, it appears that the
17 Examiner -- let me rephrase that. The Examiner does not consider the
18 invention as a whole in his analysis. You know, it's a long-standing
19 requirement of *Graham v. John Deere* and, you know, confirmed in KSR,
20 that the invention as a whole has to be considered in the analysis, and that
21 includes all the elements.

22 The Examiner rejected that premise in his analysis. And I'll just give
23 you a couple quotes out of the Examiner's Answer. He criticizes Appellants'
24 unnecessary "narrow parsing of detailed functionalities, which is
25 inappropriate and unnecessary in an obviousness combination." The
26 Examiner says "It is again important to note that" -- that first cite was

1 Examiner's Answer at 20. Examiner's Answer at 23 is a little more of a
2 complete statement. "It is again important to note that the Appellant is
3 arguing against rejections made for obviousness, not an anticipation
4 rejection. In this situation [meaning an obviousness situation] the exact uses
5 of detailed features [meaning claimed detailed features] which were obvious
6 to the ordinary practitioner make moot such obvious differences between
7 Applicants' invention and the prior art." That's at 23.

8 So what the Examiner is saying rather explicitly is that in an
9 obviousness context, the details of the claims, what he calls the specific
10 functionalities, don't matter and can be disregarded. In doing so, he's not
11 considering the claimed invention as a whole, and he's explicitly saying that
12 he doesn't need to consider all the constituent elements of that invention as a
13 whole.

14 And again, I believe this really springs mainly out of misreading of In
15 re: Kahn. If you look at the Examiner's description of his understanding of
16 In re: Kahn, he reads it as dealing with the question of what a reference
17 teaches or suggests as opposed to dealing with the issue of whether
18 motivation can be implicit. Remember, the whole debate leading up to KSR
19 was, you know, is TSM the test and if there has to be some -- if there has to
20 be some motivation to combine or modify, does that motivation have to be
21 explicit, or can it be implicit. In re: Kahn was the Federal Circuit saying it
22 could be implicit. The Examiner has misread In re: Kahn to be saying that
23 not dealing with that prong, you know, the reason to combine or motivation,
24 he reads In re: Kahn as saying that the content of a prior art reference can
25 include anything that is implicit.

26

1 And what he says -- he goes further, and he says anything that was
2 well-known in the art at the time, anything that was known, if it was known
3 to the ordinary artisan, then it can be read into the -- to a reference such as
4 Atkins on the basis that it's "implicit." And you see this through and through
5 the Examiner's analysis, where he'll say, well, Atkins doesn't show this.
6 However, this feature of sweeping funds out of, you know, an account
7 backed by a credit account, you know, was well known and therefore it's
8 implicit in Atkins.

9 So it's a really problematic bootstrapping, where the Examiner doesn't
10 show all the elements are in the reference, that first prong that we normally
11 think of in obviousness analysis, and then secondly, because he's reading in
12 the missing elements, he doesn't have to show the apparent reason to
13 combine, that is that second prong we normally think of with respect to
14 KSR.

15 JUDGE MOHANTY: Okay. Well, Atkins does show some
16 sweeping. And before we get to the KSR, is it obvious to combine, let's
17 focus on the elements, because if we're missing some elements, then we
18 won't even get there, okay?

19 MR. SCHREINER: Certainly.

20 JUDGE MOHANTY: Okay. And for some claims in your brief, you
21 haven't made -- some of the dependent claims, I think 20 and 50, I don't
22 really see KSR arguments in your brief. I mean, I don't see obvious-to-
23 combine arguments in your brief there. So you've only argued for missing
24 elements there.

25 There seems to be -- the Examiner seems to say -- you talk about
26 linked account instruments there, and one of the things that you say -- like,

1 okay, you describe the invention as those three prongs. But when I look in
2 the spec, I don't see an explicit definition for linked account instrument other
3 than what's at page 6, and there it just says that -- let's see, page 6, lines 10
4 through, say, 13, which I think you cited in your brief. You say a linked
5 account instrument is -- and you basically say it's a credit card hooked up to
6 a cash account there. So while I see what your invention is -- like you talked
7 about those three prongs, what you're claiming when I look in the spec, I see
8 a linked account instrument, well, it's just a credit card that's hooked up to a
9 cash account, okay?

10 MR. SCHREINER: Right. Yeah. I --

11 JUDGE MOHANTY: So when you say that that's missing from the
12 prior art in Atkins, well, Atkins shows, you know, I believe shows a variety
13 of accounts that are linked together. So he doesn't show, you know, the
14 accounts in the way that you have, but what your invention is and what
15 you've claimed is something else.

16 MR. SCHREINER: The Examiner took, essentially, the position that,
17 Your Honor, you know, just set forth. And what he said -- what the
18 Examiner says is that the specification actually defines a linked account
19 instrument. And then the Examiner says -- and he defined it through this
20 language on page 6, where it says that, basically, it's a card and it's linked to
21 an existing cash account, and it can be run using, you know, points of sale
22 and other transaction points. I respectfully submit that the Examiner was
23 incorrect both on the legal conclusion that there was an intent to define in
24 that language and, secondly, on the merits. First, on the legal angle of it,
25 you know, for there to be a definition by the inventor in the specification, I
26 think the law says that it has to be, you know, rather clear and rather

1 unequivocal. I realize that there's a delicate balance between that and what
2 Phillips says, you know, you use a specification as a primary source of
3 meaning for the claim terms without reading in the preferred embodiments,
4 you know, so it's a delicate balance.

5 JUDGE MOHANTY: Yeah.

6 MR. SCHREINER: But I don't think -- when you read that language,
7 I don't think it was an intent to give a definition.

8 The second and more important point is the linked account instrument
9 is described throughout the specification as not just being something that a
10 card coupled to a cash account and that can be run on points of sale.

11 Throughout the specification, the specification describes the linked account
12 card as being tied to a cash account and backed up by a credit account. And
13 that's repeated multiple times through the specification. And I can -- if --

14 JUDGE MOHANTY: Well, I agree with you, but I mean, those could
15 just be preferred embodiments. I mean, when I look at the specification, you
16 know, I look at that spot I showed you, and it seems to me to kind of
17 describe what that term means. And then, I mean, you have to get much,
18 much deeper into the specification when you bring in all those other things.

19 MR. SCHREINER: You know, the description on page 6 is just
20 describing first what the physical, you know, embodiment of the linked
21 account instrument could be, that it could be a card. And then it says that it's
22 tied to a cash account, and then transactions could be run through point-of-
23 sale, and the like. If you continue to read from the same page, at the bottom
24 it says "Transactions made using the linked account card may first be
25 processed against a cash account, and if the cash account does not contain
26 adequate funds" -- this is on page 7 -- "it may process the transactions as a

1 credit charged against the credit account." So there it's describing the linked
2 account card as being tied to a cash account and a back-up credit account.

3 On page 8, line 10, it states "A second item that a potential cardholder
4 may be required to provide in step 250 is a designated credit or other
5 account to handle overdrafts," so again describing the linked account
6 instrument in terms of a cash account and a back-up credit instrument. On
7 page --

8 JUDGE MOHANTY: Okay. I don't want to take all your time on this
9 topic --

10 MR. SCHREINER: Yeah. Okay.

11 JUDGE MOHANTY: I do want to note that a lot of the language you
12 cited used the word -- the language, "may." So it's "may," almost like it's an
13 option. But I don't want to get too tied up on this topic, so if there's another
14 point you'd like to address that's in synch with --

15 MR. SCHREINER: Yeah, there are.

16 JUDGE MOHANTY: Okay.

17 MR. SCHREINER: But on the issue of "may," I mean, what the
18 Examiner basically says is Applicant was acting as his own lexicographer,
19 and Applicant defined it as meaning this, but he used "may," permissive
20 language, therefore, there is a definition, but then really it was a
21 nondefinition. It was ambiguous, so it can kind of mean anything. And I
22 don't -- I respectfully submit that that's wrong on both the law of an inventor
23 being his own lexicographer and the facts as set forth in the spec.

24 And I'll turn now to some of the missing elements. The linked
25 account card is --

26 JUDGE LORIN: Counsel, let me stop you for a second.

1 MR. SCHREINER: Yes, sir?

2 JUDGE LORIN: You have both method and you have system
3 claims?

4 MR. SCHREINER: Yes, sir.

5 JUDGE LORIN: But your arguments are basically the same?

6 MR. SCHREINER: The arguments -- I'm focusing today on Claim 1,
7 which is a system claim. Claim 24 is a method claim, which contains
8 substantially similar recitation, so the arguments are the same. Claim 51 is
9 another system claim. It's a little bit more specific than Claim 1, so same
10 arguments would apply. Claim 50 is admittedly broader and a little bit
11 different than these other claims. So as Judge Mohanty pointed out, the
12 analysis there is different. And I would point out, though, that in Claim
13 50 -- well, anyway, I'll just leave it at that.

14 JUDGE LORIN: Well, the reason I bring it up is because -- and I
15 know one of the features you say is not shown in the prior art is this linked
16 account. But when I read Claim 1, you're not exactly claiming a linked
17 account. You're claiming an interface, right? You're claiming an interface
18 to a cash account.

19 MR. SCHREINER: What we're claiming is a system that can process
20 transactions using this linked account card, and so what is claimed as the
21 aspects of the system for processing that. So we have a first interface that
22 accesses the cash account that is used based on transactions through the
23 linked account instrument. So the linked account instrument is recited in
24 that first clause.

25 JUDGE LORIN: Yeah. You have an interface to a cash account?

26 MR. SCHREINER: Correct.

1 JUDGE LORIN: But the cash account, when it's used to incur
2 charges, it is connected to a linked account, right? It says here "Charges
3 incurred through use of a linked account instrument."

4 MR. SCHREINER: Yeah. In this -- I think this may be where --

5 JUDGE LORIN: No, my question to you is what is the difference
6 between an interface to a cash account and another interface to a cash
7 account where the cash accounts are used differently? Aren't the interfaces
8 the same?

9 MR. SCHREINER: No, they're not. This is where, actually, I think
10 reference to Figure 1 would be helpful if Your Honors have Figure 1, and I'll
11 be brief. Figure 1 of the specification, you can see there's a point-of-sale
12 terminal payment network and then authorization server. So the -- and
13 though it's not shown, the linked account card is basically being swiped at
14 that point-of-sale terminal. So let's visualize linked account cards swiped at
15 that point-of-sale terminal. And then a payment transaction is made using
16 that linked account card. And then there's a backend sweep that takes place
17 at the end of the day to pay off those amounts either from the cash account
18 or separately from the credit account. And you'll see that the authorization
19 server, which is Block 130 on Figure 1, has a first interface to the cash
20 account -- that's the Interface 136 -- and has a second separate interface, 138,
21 to the credit account.

22 And the reason that those are different is it ties into some of the
23 discussion earlier, the fact that these are two separate accounts, two
24 independent accounts, and in fact, the consumer can select one from one
25 bank, the cash account from one bank and the credit account from another
26

1 bank. So there will be different interfaces, the interfaces being some
2 combination of hardware and software.

3 JUDGE LORIN: Yeah. I can see it when you begin talking about the
4 server, the server has to function a certain way to connect it to the linked
5 account.

6 MR. SCHREINER: Right.

7 JUDGE LORIN: I think I was more keying in on the interface, so I
8 was -- hard time visualizing the difference between the interfaces. But
9 Figure 1 shows this when you get down to the server level, when you're
10 performing the sweeps.

11 MR. SCHREINER: Right. It does -- Figure 1 does show a first
12 interface to the cash account. And it does show a second, separate interface
13 to the credit account.

14 JUDGE LORIN: Because if it was in the method steps, I see that
15 more clearly. I mean, there you actually are explaining the functioning. But
16 in the system claim it's a little more difficult to visualize.

17 All right, counsel. Thank you for your explanation. Do you have any
18 more points to make?

19 MR. SCHREINER: Yeah. If I could just focus on the sweeping
20 function for the moment, or as my final point. The sweeping function as
21 claimed sweeps the underlying cash account to see if there's funds to satisfy
22 the purchases made using this special card today as well as any amounts or
23 balances that are in the credit account, the back-up credit account, as a result
24 of prior purchases. So that's done on a daily basis. You've got this
25 automatic sweeping, and it does an automatic pay-down of the credit balance
26 in the back-up credit account.

1 Neither Atkins or Schein remotely show any of this. They don't --
2 Atkins shows a personalized financial management system where you've got
3 all of your different accounts and you can manage them and you can plug in
4 your investment objectives and constraints for various cards and the like.
5 There's an expert function that'll reallocate funds among these asset and
6 liability accounts, you know, in accordance with your objectives and to
7 satisfy liability to asset ratios and the like. There's nothing remotely in there
8 about a payment card like this that is linked to a cash account and a back-up
9 credit account and that, furthermore, has the sweeping feature that we're
10 talking about with the automatic pay-down. It's just not remotely there.

11 In the case of Schein -- and the Examiner essentially acknowledged
12 that and that's why he resorted to Schein in this second Appeal. Remember,
13 this is a second Appeal based on the addition of Schein. Schein is basically
14 Citibank's, you know, global system that is basically an integrated system
15 for displaying all of the consumer's account information. And the focus in
16 Citibank is that you have all these accounts in a central database, and they
17 can be presented to a consumer so the consumer gets a unified presentation.
18 So there's an association, and if you want to take a leap, a linkage, but it's
19 only for purposes of presentation and cross-selling. That's the focus of
20 Citibank. And so Citibank -- there's nothing in Citibank remotely talking
21 about the type of payment card we're discussing here, tied to underlying cash
22 accounts backed up with credit accounts with this sweeping feature that
23 provides an automatic pay down of credit.

24 And that feature is important because without that feature, what
25 happens with consumers is the credit balance can balloon. There's no
26 automatic pay-down. You know, the principal just keeps increasing on this

1 back-up credit instrument. You have these huge interest rates. I had a
2 recent card with Bank of America that ballooned to something like 29
3 percent, and, you know, if you have a balance, that's serious money. So the
4 automatic pay-down feature is very critical.

5 JUDGE MOHANTY: Just quickly, you said this is the second Appeal
6 in this case? Do you mean that you've appealed, and then the Examiner
7 made new grounds and it was decided by another panel or --

8 MR. SCHREINER: New grounds. There was a prior rejection that
9 was based on Atkins along.

10 JUDGE MOHANTY: Okay.

11 MR. SCHREINER: And then we filed, basically, an Amendment
12 with some remarks explaining why -- well, we fully briefed it. Then the
13 Examiner didn't provide an Examiner's Answer. He reopened prosecution
14 with a new rejection based on the secondary reference of Schein. We went
15 straight back and filed, you know, the new Appeal.

16 JUDGE MOHANTY: Okay. But there's been no decision in this case
17 before?

18 MR. SCHREINER: Correct, Your Honor. Are there any other
19 questions I can answer for the Board?

20 JUDGE MOHANTY: No further questions.

21 MR. SCHREINER: Thank you very much for your time today.

22 JUDGE LORIN: No? All right, thank you, counsel.

23 JUDGE MOHANTY: Thank you very much.

24 (Whereupon, the proceedings, at 1:54 p.m., were concluded.)
25
26